2009

State of Utah v. Daniel Maestas : Brief of Appellee

Utah Court of Appeals

Case No. 20090473-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Daniel Maestas,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for Automobile Homicide, a second degree felony, Reckless Driving, a class B misdemeanor, and Open Container in a Vehicle, a class C misdemeanor, in the Third Judicial District Court of Utah, Salt Lake County County, the Honorable Sheila McCleve presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for Automobile Homicide, a second degree felony, in violation of Utah Code Ann. § 76-5-207(3) (West Supp. 2007); Reckless Driving, a class B misdemeanor, in violation of Utah Code Ann. § 41-6a-528 (West Supp. 2005); and Open Container in a Vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6a-526(2) (West Supp. 2005). This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(e) (West 2008).

STATEMENT OF THE ISSUES

1. Where Maestas was interviewed for fifteen minutes in a hospital emergency room and was told he was not under arrest and did not have to say anything, did the trial court properly rule that Maestas's statements were admissible under the federal constitution? Alternatively, was Maestas's trial counsel ineffective in failing to support his involuntariness

claim with evidence concerning the possible effect on Maestas's mental state of the medications he received in the emergency room?

Standards of Review. This Court reviews a trial court's voluntariness and custodial determinations for correctness. *See State v. Rettenberger*, 1999 UT 80, ¶ 10, 984 P.2d 1009; *State v. Brandley*, 972 P.2d 78, 81 (Utah App. 1998). This Court reviews a trial court's factual findings underlying those rulings for clear error. *See Brandley*, 972 P.2d at 81. An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. *See State v. Walker*, 2010 UT App 157, ¶ 13, 235 P.3d 766.

2. Did Maestas's trial counsel provide ineffective assistance when, in seeking the admission of a co-defendant's statement, counsel failed to have the co-defendant formally invoke his Fifth Amendment right against self-incrimination, where all parties and the court agreed that such a formality was unnecessary to establish the co-defendant's unavailability under the hearsay rules of evidence?

Standard of Review. An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law. *See State v. Walker*, 2010 UT App 157, ¶ 13, 235 P.3d 766.

3. Does Maestas's cumulative error claim fail, where he has not shown any error at his trial?

Standard of Review. No standard of review applies to this issue.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions and evidentiary rules, relevant to this appeal, are attached at Addendum A: U.S. Const. Amend V, VI, XIV; Utah R. Evid. 801, 804.

STATEMENT OF THE CASE

Maestas was charged with automobile homicide, a second degree felony; reckless driving, a class A misdemeanor; and driving with an open container, a class B misdemeanor, in connection with the death of a passenger in the car he was driving when the car crashed on February 22, 2008. R.2-5.

Before trial, Maestas filed a motion to suppress statements he had made at the hospital after the accident. R.67-71. After an evidentiary hearing, the trial court denied his motion. R.119; 196-202, 203-04. Maestas was tried before a jury with the driver of the second car, Alex Bloomfield. R. 215. The jury convicted Maestas as charged. R. 134-36. Maestas received a prison term of 1 to 15 years on the automobile homicide conviction, to be served consecutive to any sentence he was then serving. He was sentenced to 180 days in prison on the reckless driving conviction and 60 days in prison on the open container conviction, both to run concurrent with his automobile homicide sentence. R.190-190.

Maestas timely appealed. R.205-06, 210-11.

STATEMENT OF FACTS

The Accident

At about 10:30 p.m. on February 21, 2008, Maestas and four friends met at Southern Exposure, a private club located at about 5200 South State in Murray, Utah, to celebrate one of their birthdays. R. 217:434. After drinking alcohol, playing pool, and watching strippers, the five left Southern Exposure at about 1:35 a.m. on February 22. R. 217:434-36; R. 218:590. Maestas and George Tui Asa got into Maestas's 1999 Cadillac and Alex Bloomfield got behind the wheel of a rented Impala, along with two passengers. R. 216:253, 283, 385; R. 217:436-37, 440; R. 218:696, 698.

From State Street, both cars turned on 5300 South and, at speeds approaching 100 mph, raced to 40th West. R.217:738-39, 751, 768, 776. Both cars turned north on 40th West. R 217:781-84. The cars then raced, again at speeds of 100 mph, up 40th West. R. 217:781-84, 799-802.

When 40th West rose and then dipped as it went over a canal—at about 4750 South—Maestas's Cadillac started to skid. R. 216:267; R. 217:614-15. By the time it went through the intersection at 47th South, the Cadillac was facing almost due east, skidding sideways up 40th West. R. 215:196-97; R. 217:627. Just past that intersection, the Cadillac's front right tire hit the west-side curb of 40th West, and the car started to spin counterclockwise. R. 217:628-30. As the car spun, it hit two newspaper boxes, a stop sign, the cement parking barriers that separated a U-haul store from the sidewalk, and a U-haul truck parked at the U-

haul store. R. 217:630-33. As the car continued to spin, its front hit a second U-haul truck and its front passenger door slammed into the cement base of a light pole. R. 217:637-43. After wrapping itself around the cement base of the light pole, the Cadillac came to rest on the west side of the road, facing north. R. 216:251-52.. All major impact from the accident occurred on the passenger side of the Cadillac. R.216:251-52, 255-56. The driver's side showed no damage from any external impact. R. 216:257; R. 217:643.

Neither Maestas nor his passenger, George Tui Asa, were wearing seatbelts at the time of the accident, and both were ejected from the car during the crash. R. 215:215-16; R. 216:301, 304. Maestas was knocked unconscious and had minor bleeding from his head, but otherwise had no sign of external injury. R.216:52; R. 217:649, 814. George died at the scene. R. 216:252; R. 217:649. Blood and flesh from George's face was found on the passenger side of the car, the car roof, and both the light post and its cement base. R. 216:270; R. 217:645-47, 653-54, 676. Blood was also found on the passenger side air bag, but not the driver's side air bag. R. 217:652, 655.

Medical Response

Medical personnel arrived at the scene of the accident at 1:55 a.m. R.214:25; R.216: 456; St. Exh. 1. By then, Maestas had regained consciousness. R. 216:459; R. 217:815. Maestas showed no signs of being seriously injured, nor did he indicate he was in any pain. R. 216:460, 462, 476, 480. Maestas's vital signs were normal, he was alert and oriented, and

he had a Glasgow score of 13-15. St. Exh. 1; R.216:464, 481.[1] When asked, Maestas told the paramedic that he had been at a party and had drank quite a bit. R. 216:465. He also told the paramedic that he had been driving the Cadillac. R. 216:465, 488.

Notwithstanding no overt sign of injury, the paramedic placed Maestas in a neck brace and on a back board as a precautionary measure, and at 2:14 a.m. Maestas was life-flighted to the trauma unit at the University of Utah. R.214:25; R. 216:460-61, 466-67; St. Exh. 1.

Tests conducted on Maestas at the hospital indicated that Maestas's only injury was a break to a vertebra in his neck. R. 218:563-65. However, Maestas suffered no loss of movement in his legs or arms. R. 218:563-65. Finally, although Maestas was given pain medication before the tests, he still had a Glascow coma score of 15 after them. R. 218:568.

Hospital Interview by Officer Horner[2]

While en route to the accident scene, Officer Jay Horner was redirected to the University of Utah Hospital to talk with Maestas. R. 188:90; R. 214:46. He arrived at the hospital at 3:03 a.m. and went to the emergency room treatment area. R.214:47. Only hospital staff, patients, and hospital security personnel had access to the area. R. 214:47.

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[1] Testimony at trial established that a Glasgow score measures the level of a patient's confusion, and that a Glasgow score of 15 indicates no confusion. R. 216:468, 471.

[2] The majority of this evidence is taken from the preliminary hearing and suppression hearing.

When Officer Horner arrived, Maestas was having some tests done and, therefore, was not available. R. 188:91; R. 214:48. While awaiting Maestas's return, Horner talked with officers who had been at the scene of the accident and learned that Maestas was conscious when he was life-flighted to the hospital and that the officers believed Maestas had been one of the drivers in the crash. R. 188:103; R. 214:26-27, 33, 37, 46, 51. Horner also learned that Maestas was possibly intoxicated. R. 214:52. Horner was told "to speak with him as a pre-arrest type conversation just to get his side of the story of what happened." R. 214:26-27, 33, 37, 52. Horner was specifically told not to arrest Maestas and to tell Maestas that he was not being arrested. R. 214:214:26-27, 33, 37, 53.

When the tests on Maestas were completed, he was returned to the emergency room and placed in one of the individual rooms surrounding the nurses' stations. R. 188:91; R. 214:49, 53. Maestas was not accompanied by a security guard, was not strapped to his bed, and had no type of restraints on him. R. 214:53-54. The room was "a large, large room," and Maestas "was on his bed about in the middle of the room and backed up against a wall." R. 214:71.

On Officer Horner's request, hospital said it was okay for him to speak with Maestas as far as they were concerned. R. 188:109. Officer Horner thereafter "made contact with [Maestas], introduced [him]self, told [Maestas] why [he] was there and asked [Maestas] what happened." R. 188:913-94, 110; R. 214:54. Horner "was a couple feet away standing up." R. 214:71. No family members were present in the room. R. 214:55. Medical personnel,

however, were coming and going freely. R.188:97; R. 214:55. Officer Horner did not recall the door to the room ever being closed. R. 214:55.At the time, Horner was in uniform, "[s]tandard blue top, blue bottom, duty belt, badge, name tag, West Valley patches," and Horner identified himself as a police officer. R.188:94, 110; R. 214:43. On his belt, he had a "[f]irearm, extra magazines, radio, handcuffs, OC spray, mask, baton, tazer." R. 214:44. The firearm was secured in a holster at his right hip. R. 214:44-45. The handcuffs were secured at the back of his belt. R. 214:45. At no point did Horner ever draw his gun, pull out his handcuffs, or tell Maestas he was under arrest. R. 214:64, 69.

During the interview, which occurred within the first five to fifteen minutes, Officer Horner "asked [Maestas] very minimal questions." R. 214:60, 65. He did not tell Maestas that police believed he was the driver of the Cadillac. R. 214:65. Nor did he tell Maestas that a person died in the accident. R. 188:97. Horner did, however, make it "very clear" to Maestas that Maestas was not under arrest. R. 188:94, 110. He also told Maestas several times that it was "his option to speak with me"—"that he was not required to." R. 188:94, 110; R. 214:60. Horner told Maestas he just wanted to get Maestas's side of the story. R. 188:96, 105, 110. Horner took notes in a notepad; when he quoted Maestas verbatim, he put those notes in quotation marks. R. 214:56-57.

Most of Maestas's statements came at the beginning in the conversation. R. 214:61. Horner asked Maestas where he was going to and coming from, but Maestas could not remember. R. 188:97; R. 214:61. According to Horner, Maestas also said he could not

remember the accident and "only remembered driving the Cadillac." R. 188:96-97, 112; R. 214:59-60, 61. However, Maestas told Horner, "I want to know if I hurt anybody" and said, "that would be pretty fucked up if anybody got hurt." R. 188:95-96, 111-12; R. 214:56, 59.

While they were talking, Maestas's speech was slurred," he "appeared intoxicated," and "[h]is eyes were glazed over." R. 188:98, 117-18, 126; R. 214:63. Also, Maestas was hooked up to a catheter, and had urinated about half a liter. R. 188:118. In addition, Maestas's "demeanor was very aggressive" and he "used profanity quite often," including calling officers and and hospital staff "mother fucker[s]." R. 188:98; R. 214:64, 78-79. However, Maestas was not intoxicated to the degree where he was "just out of it." R. 214:64. To the contrary, "he was very coherent" and "gave [Horner] reasonable answers. His statements were reasonable to a conscious person." R. 214:64.

Maestas was in a neck brace at the time, but hospital staff told Horner that it was just as a precautionary measure. R. 214:61. However, Maestas "had full movement in his arms and legs," and, at one point, said that he did not need a neck brace and "was 'fine.'" R. 214:61. At another point, however, Maestas did complain about pain in his left leg and back. R. 188:118. Horner could not recall if Maestas had IV's in his arm. R. 214:73. Horner did not ask any hospital staff what medications Maestas had received. R. 214:74.

Because he had been told to wait with Maestas until instructed otherwise, he "just kind of hung out" after their conversation, "and there was a lot of time in there w[h]ere there was no interaction between us." R. 214:60. At one point when they "weren't interacting,"

Maestas fell asleep. R. 188:119; R. 214:62. Just after Maestas awoke, Officer Grecko arrived to do a blood draw on Maestas, to which Maestas gave his consent. R. 214:58. Officer Grecko did not ask Maestas any questions concerning the accident, and left after completing the blood draw. R. 214:66.

Almost immediately thereafter, at about 5:00 a.m., Maestas was moved to room 617 in another part of the hospital. R. 188:98-99, 121; R. 214:66. Horner went with him to that room. R. 188:99, 121. No other officer was present. R. 214:68. The door was never closed. R. 214:72. Maestas's friends and family were able to go in and out. R. 188:98-99, 121; R. 214:72. In addition, Maestas used at least one person's cell phone to call people. R. 188:101.

Horner did not ask Maestas any questions after Maestas was moved to room 617. R. 214:68. And Horner could not recall Maestas saying even "one word" to him once in that room. R. 214:83. However, shortly after their arrival in the room, "there were multiple visitors for [Maestas]." R. 188:98-99, 121; R. 214:67. Maestas said to one visitor, "I'm sorry, mom," and "don't be mad at me." R. 2154:68. When his cousin, Carlos, told him that someone had died in the accident, Maestas responded, "Fuck, that's homicide." R. 188:99, 122; R. 214:68. Although Maestas cried for about five minutes after hearing that news, he then turned "very jovial, flirtatious, joking, and laughing." R. 188:100, 123. Maestas told one person over the cell phone that "I fucked up." R. 188:101. But he also joked about "[n]aked pictures" on a cell phone and about "call[ing] his girls up so that he could have

some pussy that night." R. 188:101. He also flirted with the hospital phlebotomist about her having his baby. R. 188:101-02.

Officer Horner left the hospital around 7:30 a.m., but he was not replaced by another officer. R. 188:125, 128; R. 214:69.

Accident Reconstruction

Based on the evidence that included the Cadillac's skid marks, calculations of the Cadillac's speed before it crashed, videos from local businesses recording the crash, the damage to the Cadillac, and the blood and flesh evidence found at the scene, Detective Darren Mower, an expert in accident reconstruction, reconstructed the accident to determine who was driving the Cadillac at the time. R. 217:610, 613-72, 679-80. Using that evidence, two computer programs, and the law of physics concerning how bodies would move in such a crash, Mower concluded that George was in the front passenger seat at the time of the crash, and was ejected through the opening created when the Cadillac hit the concrete base of the light pole. R. 217:678, 732. Mower concluded that Maestas was the driver at the time of the crash, that he was initially moved to the right rear corner of the car during the car's rotation, and then ejected through the rear driver's side door as the car spun around the pole. R. 217:678-79, 732.

Maestas's Arrest

On February 26, Detective Mower went to the hospital to interview Maestas, but learned that Maestas had been discharged at 6:00 p.m. on February 23rd. R. 214:28. Mower

was surprised because he thought Maestas "was going to be there for quite a while." R. 214:39. Mower went to Maestas's family's house on February 27th and talked with Maestas, but did not arrest him. R. 214:29. When Mower completed his investigation of the accident in March, however, a warrant was issued for Maestas's arrest. R. 214:34. Maestas turned himself into police on April 11th. R. 214:30-31.[3]

SUMMARY OF ARGUMENT

Point I. Maestas claims that the trial court erred when it denied his motion to suppress all the statements he made at the hospital because they were taken in violation of the Fifth Amendment and Due Process Clause of the United States Constitution.

Maestas first claims that the trial court should have granted his motion because all of his statements at the hospital "were taken involuntarily." Alternatively, Maestas claims his counsel rendered ineffective assistance in failing to support his involuntariness claim with evidence concerning the possible effects of his injuries and the medication he was given at the hospital on his mental state when he made the statements. Both of Maestas's claims, however, focus on his alleged compromised mental state when he made his statements. But the United States Supreme Court has held that the defendant's mental state is irrelevant to a voluntariness determination under the federal constitution, absent evidence of coercive police

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[3] Maestas challenges the trial court's finding "that after Maestas as released from the hospital, Detective Mower 'went to [Maestas's] home where he attempted to conduct an interview, but left when [Maestas] refused to speak with [him].'" Aplt. Br. at 17 (citing R. 200). The State agrees that Detective Mower testified that he spoke with Maestas during that visit. *See* R. 214:29. But Maestas makes no showing that the court's finding, even if erroneous, renders the trial court's suppression rulings erroneous.

activity in obtaining the statements. Here, Maestas cannot demonstrate coercive police activity during Officer Horner's brief interview of him. Absent that showing, Maestas cannot show either that the trial court erred in ruling that his statements were voluntary or that he was prejudiced by counsel's alleged failure to present additional evidence concerning his possible mental state.

Maestas next claims that the court should have granted his suppression motion because his statements "were obtained through custodial interrogation without the benefit of *Miranda* warnings." A person is in custody for *Miranda* purposes, however, only if his "freedom of action [was] curtailed to a degree associated with formal arrest." Here, Maestas was interviewed for fifteen minutes by a single officer in a hospital emergency room. The officer clearly informed him at the start of the interview that he was not under arrest and that he did not have to speak to the officer. The officer never intimated to him that he was a suspect in a crime. The officer never threatened or restrained Maestas, nor did the officer ever display a weapon or handcuffs. The door to the room was never closed. And medical personnel entered and exited the room without restriction to attend to Maestas. Based on these facts, Maestas's "freedom of action" was not "curtailed to a degree associated with formal arrest." Thus, Maestas was not in custody when the officer interviewed him, and the officer was not required to give Maestas *Miranda* warnings before the interview.

Point II. Maestas claims that his counsel rendered ineffective assistance by failing to force co-defendant Bloomfield to take the stand to formally invoke his right not to testify

before attempting to have a statement by him that was favorable to Maestas admitted at trial. According to Maestas, if counsel had forced Bloomfield to take the stand and invoke his right, Bloomfield's statement would have been admissible under rules 801 and 804, Utah Rules of Evidence.

Rule 801 requires that the declarant take the witness stand before his prior inconsistent statements can be admitted as substantive evidence. However, Maestas cites no case law holding that a criminal defendant can force his co-defendant in the same trial to take the witness stand. Thus, Maestas has not shown that his counsel performed deficiently in not forcing Bloomfield to take the stand.

Moreover, rule 801 requires that the declarant be subject to cross-examination before his prior inconsistent statements can be admitted as substantive—rather than impeachment—evidence. Because Bloomfield would have invoked his right not to testify, he would not have been subject to cross-examination. Thus, his statement would not have been admissible as substantive evidence. Admission of his statement under rule 801, therefore, could not have altered the result of Maestas's trial.

Rule 804 governs the admission of statements from unavailable witnesses. Here, all parties at Maestas's trial stipulated that, because he would invoke his right not to testify if called as a witness, he was unavailable. Moreover, the trial court's ruling accepted that stipulation, but found the evidence inadmissible on other grounds. Given those facts,

Maestas cannot show either deficient performance or prejudice in his counsel's failure to, nonetheless, force Bloomfield to take the stand and formally invoke his right not to testify.

Point III. Maestas claims that his conviction must be reversed because the cumulative effect of the errors at trial undermined confidence in the fairness of his trial. Maestas, however, has not demonstrated any errors at trial. Thus, his claim fails.

ARGUMENT

I.

WHERE MAESTAS WAS INTERVIEWED FOR FIFTEEN MINUTES IN A HOSPITAL EMERGENCY ROOM AND WAS TOLD HE WAS NOT UNDER ARREST AND DID NOT HAVE TO SAY ANYTHING, THE TRIAL COURT PROPERLY RULED THAT MAESTAS'S STATEMENTS WERE ADMISSIBLE UNDER THE FEDERAL CONSTITUTION

Maestas claims that the trial court should have granted his motion to suppress statements he made at the hospital after the accident "because all of Maestas's statements were taken involuntarily." Aplt. Brf. at 15-16. Alternatively, Maestas claims his counsel rendered ineffective assistance under the Sixth Amendment by failing to support his involuntariness claim with evidence concerning the possible effects of his injuries and the medication he was given at the hospital on his mental state when he made the statements. Aplt. Br. at 32. Maestas also claims that his statements "were obtained through custodial interrogation without the benefit of *Miranda* warnings." Aplt. Br. at 15-16. Each claim fails.

A. The trial court correctly ruled that Maestas's statements were voluntary.

The trial court concluded that Maestas's "statements were voluntarily given." R. 201. The court explained that although Maestas "had received some medications, ... there was no evidence about their effect" and Maestas's "ability to converse, ask and answer questions, and flirt indicated his responses were voluntary." R.201.[4]

Maestas challenges the trial court's conclusion, claiming that "[his] statements at the hospital were made involuntarily" because his "'will, already vulnerable due to' intoxication, injury, pain, trauma, and medication, 'was overborne by the suggestive and coercive techniques used by [Officer Horner], which exploited those very vulnerabilities.'" Aplt. Br. at 27 (quoting *State v. Rettenberger*, 1999 UT 80, ¶ 45, 984 P.2d 1009). Alternatively, Maestas claims that "defense counsel provided ineffective assistance when she failed to investigate or present evidence regarding the effects of the injury, trauma, and medication on Maestas's demeanor and memory" and "when she failed to renew the motion to suppress

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[4] Maestas challenges the trial court's finding "that Maestas 'was coherent and gave reasonable answers to Officer Horner's questions' and asked questions 'that were coherent and reasonable.'" Aplt. Br. at 17 (citing R. 199). According to Maestas, he explains how "this finding is clearly erroneous" in "Part I.B." *Id.* In Point I.B., however, Maestas makes no attempt to marshal the evidence supporting the trial court's finding or to identify the fatal flaw in that evidence. *See* Aplt. Br. at 17-27. Rather, he merely assumes that, because Maestas was intoxicated, had been injured in a serious accident, was agitated, and had received medication at the hospital, he necessarily was too confused to give coherent statements. *See id.* Thus, Maestas's challenge to the court's finding fails. *See Chen v. Stewart*, 2004 UT 82, ¶ 76, 100 P.3d 1177 (setting forth marshaling burden); *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991).

after Dr. Larsen testified at trial that the trauma and medication (especially combined with alcohol) could explain Maestas's mood fluctuations and memory loss." *Id.* at 32. Neither of Maestas's claims has merit.

1. The trial court properly ruled that Maestas's statements were voluntary.

As stated, Maestas claims that the trial court erred in ruling that his statements to Officer Horner were voluntary "because the circumstances show that [his] 'will, already vulnerable due to' intoxication, injury, pain, trauma, and medication, 'was overborne by the suggestive and coercive techniques used by [Officer Horner], which exploited those very vulnerabilities.'" Aplt. Br. At 27 (quoting *Rettenberger*, 1999 UT 80, ¶ 45). The United States Supreme Court's seminal case, *Colorado v. Connelly*, 479 U.S. 157 (1986)—which Maestas does not once cite—and *Rettenberger* defeat his claim.

Whether a defendant's statements were voluntary under the federal constitution "must be decided by viewing the 'totality of the circumstances.'" *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (quoting *Clewis v. Texas*, 386 U.S. 707, 708 (1967)); *accord State v. Rettenberger*, 1999 UT 80, ¶ 14, 984 P.2d 1009. "[C]ourts must consider such external factors as the duration of the interrogation, the persistence of the officers, police trickery, absence of family and counsel, and threats and promises made to the defendant by the officers." *Rettenburger*, 1999 UT 80, ¶ 14. "Courts must also consider such factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system." *Id.* at ¶ 15.

Maestas acknowledges these factors. *See* Aplt. Br. at 18-19. He then relies on pre-*Connelly* case law to suggest that a defendant's mental state alone can render his statements involuntary. *See id.* at 20-23, 26 (citing *Blackburn v. Alabama*, 361 U.S. 199, 207-09 (1960); *Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Gladden v. Unsworth*, 396 F.2d 373, 380-81 (9th Cir. 1968); *United States v. Russell*, 309 F. Supp. 68, 73 (U.S. E.D. 1970); *Logner v. North Carolina*, 260 F. Supp. 970, 975 (U.S.N.D. 1966); *State v. Williams*, 208 So. 2d 172, 175 (Miss. 1968)).

In *Connelly*, however, the Supreme Court expressly rejected any interpretation of its prior case law—including *Blackburn*, *Townsend*, and *Mincey*—as holding that "the United States Constitution requires a court to suppress a confession" merely because "the mental state of the defendant, at the time he made the confession, interfered with his 'rational intellect' and his 'free will.'" *Connelly*, 479 U.S. at 159. As the Court explained, voluntariness "has always depended on the absence of police overreaching, not on 'free choice' in any broader sense." *Id.* at 170. Thus, the Court held, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of [both] the Due Process Clause" and the Fifth Amendment. *Id.*; *accord Rettenberger*, 1999 UT 80, ¶ 11; *State v. Piansiaksone*, 954 P.2d 861, 865 (Utah 1998).

Consequently, "sweeping inquiries into the state of mind of a criminal defendant who has confessed"—such as Maestas makes here—are irrelevant to a "voluntariness" determination under the federal constitution if those "inquiries [are] divorced from any

coercion brought to bear on the defendant by the State." *Connelly*, 479 U.S. at 167; *accord Rettenberger*, 1999 UT 80, ¶ 17. Absent police coercion, the Court held, the admissibility of a defendant's statements based on concerns about their reliability because of his mental state at the time "is governed by state rules of evidence," not the federal constitution. *Id.* at 159.

In sum, a confession is not rendered involuntary solely because the "police officer kn[ew] of a suspect's mental illness or deficiencies at the time of the interrogation." *Rettenberger*, 1999 UT 80 ¶ 18 (citing *Connelly*, 479 U.S. at 164-65). Rather, a confession only becomes involuntary if the officer engages in "coercive activity," *Connelly*, 479 U.S. at 165, to "exploit[] those weaknesses, to obtain a confession." *Rettenberger*, 1999 UT 80 ¶ 45 (citing *Connelly*, 479 U.S. at 164-65).

Here, Maestas has not identified any coercive activity by Officer Horner in the course of his interview. Thus, his claim that those statements were constitutionally involuntary fails under *Connelly* and *Rettenberger*.

First, to the extent Maestas relies on the fact that "Officer Horner did not record the interrogation," did not "record some of the allegedly incriminating statements verbatim," and did not give "Maestas the opportunity to write a confession or show his notes to Maestas so that Maestas could review and sign them," Aplt. Br. at 24, 26, all of those factors go to the reliability of Officer Horner's testimony concerning Maestas's statements, not whether Maestas's statements were voluntary. And, as the Supreme Court held in *Connelly*, those issues are "governed by state rules of evidence," not the federal constitution. *Connelly*, 479

U.S. at 159. Thus, those factors are irrelevant to a determination of whether Maestas's statements were voluntary under the federal constitution. *See id.*[5]

Second, Maestas suggests in passing that the absence of "family and friends" during the brief interview rendered Maestas vulnerable to police coercion. *See* Aplt. Br. at 23. However, family presence is not a prerequisite to a voluntary confession. The relevant question is not whether or not family or friends were present, but whether police restricted access to family and friends. *See Haynes .v Washington*, 373 U.S. 503, 514 (1963) (finding coercion where police consistently denied defendant's requests to call his wife, and "condition[ed] ... outside contact upon his accession to police demands"). Nothing in the record indicates that Maestas requested his family's presence during the interview or that Officer Horner otherwise restricted their access to him. Moreover, Maestas's use of

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[5] Maestas challenges the trial court's finding that "'Officer Horner asked questions of [Maestas], and the answers were written down by Officer Horner in his notebook, which were then included in his report,'" because "the record shows that Officer Horner only wrote down the answers that he believed 'might be relevant' to the investigation, and he did not always write the answers verbatim." Aplt. Br. at 16 (citing R. 198). Even if Horner "only wrote down the answers that he believed 'might be relevant' to the investigation," however, Maestas does not show how that fact renders the trial court's finding clearly erroneous. *See id.* Nor does he show how that fact renders the trial court's suppression rulings erroneous. *See id.*

Maestas also challenges the trial court's finding 'that Maestas 'admitted to driving the vehicle'" as "incomplete," because "Officer Horner did not write down Maestas's response verbatim and, by the time of the hearing, he could not recall what question he had asked or exactly what Maestas had responded." Aplt. Br. at 17 (citing R. 199). However, Maestas does not explain how the evidence he cites renders the trial court's finding clearly erroneous. *See id.* Nor does he show how that fact renders the trial court's suppression rulings erroneous. *See id.*

profanity toward Officer Horner, R. 188:98; R. 214:64, 78-79, indicates that Maestas was not intimidated by Horner's position, even absent family and friends.[6]

Next, Maestas asserts that Officer Horner engaged in coercive conduct when he "gave no hint that the situation was serious" and "withheld information from Maestas that the police believed he was the driver, that the other passenger had died, and that serious criminal charges were pending." Aplt. Br. at 24. However, neither of the cases cited by Maestas establish any wrongdoing by Horner. *See id.* (citing *Russell*, 309 F. Supp. at 71; *Rettenberger*, 1999 UT 80, ¶ 26).

In *Russell*, a murder case, officers elicited a confession from Russell after lying to him that his victim had not died and that he would not face serious charges. *See Russell*, 309 F. Supp. at 71. And in *Rettenberger*, officers elicited a confession from Rettenberger after

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[6] Maestas claims the trial court erred in concluding "that Maestas 'was not in custody' while in the emergency room because 'there was no restriction on access to' him and his 'family had access to him.'" Aplt. Br. at 16 (citing R. 201). In his suppression motion, however, Maestas sought to suppress not only the statements he made to Officer Horner in the emergency room, but the statements he made to friends and family after being moved into room 617. R. 67-71. Relevant to statements made in the emergency room, the trial court found Maestas "was not in any type of restraint," [t]he door remained open and unlocked, and medical and hospital personnel were in and out of the room while the defendant was there." R. 197-98. Relevant to statements made in room 617, the court found that Officer Horner "did not put any restraints on [Maestas], nor did he restrict access to [Maestas]," and "[f]amily members and friends freely entered the room and contacted [Maestas]." R. 198, 200. Given these findings, the trial court's reference during its custody ruling to "his family [having] access to him" relates to court's ruling that, in addition to Maestas not being in custody in the emergency room, Maestas also was not in custody in room 617. In any case, as stated, Maestas never requested the presence of his family in the emergency room.

using multiple forms of police trickery--including "egregious" misrepresentations of the strength of the State's case, "use of the so-called 'false friend' technique," threats that the defendant might face the death penalty, and placement of the defendant in solitary confinement over the course of two days of interrogation. *Rettenberger*, 1999 UT 80, ¶¶ 20-36, 45. Here, Horner did not represent to Maestas that the victim had not died in the accident, nor did Horner suggest in any way that Maestas would not face serious charges as a result of the accident. And Maestas cites no case law suggesting that an officer's failure to fully inform a defendant about the circumstances of the crime—as opposed to an officer's misrepresentation of those circumstances—constitutes "police trickery" sufficient to render a confession involuntary. *See* Aplt. Br. at 24. Indeed, *Rettenberger* implicitly rejects such a contention. *See, e.g., Rettenberger*, 1999 UT 80, ¶ 20 (except in "egregious" circumstances, "'[a] defendant's will is not overborne simply because he is led to believe that the government's knowledge of his guilt is greater than it actually is'") (citation omitted); *id.* at ¶ 28 ("We do not hold that the use of the false friend technique in police interrogations is, standing alone, sufficiently coercive to produce an involuntary confession."); *id.* at ¶ 32 (questioning whether police exaggeration concerning gravity of crime and ability of officers to lessen them if the defendant confessed, standing alone, is sufficient to render confession—even of mentally deficient defendant—involuntary).

Maestas's only remaining contention, therefore, is that, because of his alleged compromised mental state, Officer Horner's decision to interview him at all was sufficient

police misconduct to render his statements involuntary. *See* Aplt. Br. at 17-24. However, Maestas cites no post-*Connelly* case holding that merely interviewing a mentally vulnerable defendant constitutes police misconduct sufficient to render a confession involuntary. *See* Aplt. Br. at 17-27. And such a holding would conflict with *Connelly*, which requires *coercive* police conduct as a "necessary predicate to the finding that a confession is not 'voluntary'" under the federal constitution. *Connelly*, 479 U.S. at 165, 168 (rejecting approach that "fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by the defendant, on the other"). It would also conflict with *Rettenberger*, in which the Utah Supreme Court engaged in a thorough discussion of the techniques used during the interview of a mentally deficient defendant before concluding that pervasive and "egregious" police misconduct rendered the defendant's confession involuntary. *See Rettenberger*, 1999 UT 80, ¶ 45; *cf. Salt Lake City v. Carner*, 664 P.2d 1168, 1172 (Utah 1983) (fact that intoxicated defendant "was requested . . . to perform the field sobriety tests" does not establish that defendant "was forced, coerced or intimidated into performing them. Rather, it appears that he performed them voluntarily."); *see also United States v. Cristobal*, 293 F. 3d 134 (4th Cir. 2002) (rejecting "suggest[ion] that coercion and police overreaching occurred here merely because the agents did not wait until Cristobal was released from the hospital or transferred out of intensive care before subjecting him to questioning").

In sum, Maestas has not shown that any "coercive police activity" during Officer Horner's interview with him. Absent that showing, Maestas cannot show that the trial court erred in ruling that his statements to Officer Horner were voluntary and, therefore, admissible under the federal constitution.[1]

2. Maestas's ineffective assistance claim fails.

Alternatively, Maestas claims that "defense counsel provided ineffective assistance when she failed to investigate or present evidence regarding the effects of the injury, trauma, and medication on Maestas's demeanor and memory" and "when she failed to renew the motion to suppress after Dr. Larsen testified at trial that the trauma and medication (especially combined with alcohol) could explain Maestas's mood fluctuations and memory loss." Aplt. Br. at 32. According to Maestas, he was prejudiced by counsel's deficiencies because the trial court "based its voluntariness ruling on the absence of this evidence." *Id.* at 35.

To prevail on an ineffective assistance of counsel claim, Maestas must show both that "counsel's performance was deficient, in that it fell below an objective standard of

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[1]In a footnote, Maestas asserts that, because his statements to Horner were involuntary, his subsequent statements to his friends and family are also inadmissible as the "fruit of the poisonous tree." Aplt. Br. at 25 n.4. Because Maestas has not demonstrated that his statements to Horner were involuntary, however, this Court need not reach Maestas's "fruit of a poisonous tree" claim. In any event, Maestas presents no evidence suggesting that his subsequent statements to family and friends were in any way the product of Officer Horner's questions, and he cites no case law holding that unsolicited statements made to friends or family constitute "fruit of a poisonous tree."

reasonable professional judgment" and that "counsel's deficient performance was prejudicial—i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Maestas must establish both prongs, but has shown neither.

As discussed, *supra*, to prevail on a claim that Maestas's confession was involuntary, counsel was not only required to show that police were cognizant of Maestas's mental deficiencies, but that they engaged in coercive activity to exploit those deficiencies. And as discussed, *supra*, at 29-33, nothing in the record suggests that police engaged in any such activity. Accordingly, even had counsel presented additional evidence regarding the possible effects of the injury, trauma, and medication on Maestas's demeanor and memory, his claim that the confession was involuntary would still have failed. "It is well settled that counsel's performance at trial is not deficient if counsel refrains from making futile objections, motions, or requests." *State v. Perez-Avila*, 2006 UT App 71, ¶ 7, 131 P.3d 864. Accordingly, Maestas has failed to meet the threshold requirement for establishing ineffective assistance of counsel.

In any case, Maestas's ineffective assistance challenge to the voluntariness of his statements fails because he cannot show that he was prejudiced by his counsel's conduct, even if it were deficient.

Relying on Dr. Larsen's testimony at trial, Maestas claims that counsel was ineffective because "she did not present evidence to show that the injuries and drugs affected

Maestas's ability to speak voluntarily." Aplt. Br. at 33-34. But Dr. Larsen only testified as to the possible effects of Maestas's injuries and medications on his mental state, not that Maestas actually experienced those effects. *See* R. 217:574-584. Although the record does suggest that Maestas suffered from partial memory loss and agitation, it does not support Maestas's contention that he also suffered from confusion as a result of his injuries and medications. The paramedic who treated Maestas at the scene of the accident testified that Maestas was alert and oriented, that he remembered the accident, and that he knew his name, his birthdate, where he was, and what day of the week it was. R. 216:464, 468, 481. The paramedic also gave Maestas a Glascow coma score of 15, indicating that Maestas showed no signs of confusion. R. 216:468, 471. Dr. Larsen testified that when Maestas arrived at the trauma unit, he was given a Glascow score of 14, which reflected slight confusion, but that after Maestas was given his first dose of Fentanyl, his Glasgow score was 15, which reflected no confusion. R. 217:559, 568. Morever, Dr. Larsen testified that Zofran generally has no side effects. R. 217:569. And although Fentanyl "does have the potential to cause some confusion and . . . to make someone disinhibited a little," and alcohol could increase those potentials, nothing in Maestas's record indicated he had any problems with the medication. R. 217:569, 571, 579-81. Finally, Dr. Larsen testified that any other medications Maestas received at the hospital were administered after he left the emergency room, R. 217:583, and, therefore, *after* Maestas's interview with Officer Horner.

In sum, Maestas has shown neither deficient performance nor prejudice. His ineffectiveness claim thus fails.

B. The trial court correctly ruled that Maestas was not entitled to *Miranda* warnings, because he was not in custody when he made his statements.

The trial court also rejected Maestas's *Miranda* claim. The court observed that Maestas "was subject to interrogation when Officer Horner asked him questions about the collision," but concluded that he "was not in custody for purposes of *Miranda* based on the totality of the circumstances." R.201. The court so concluded because (1) "[t]he hospital room was a neutral location and their was no restriction on access to [Maestas]"; (2) [t]he interrogation was minimal, fifteen minutes, and was investigatory, not accusatory"; (3) [t]here was no objective indicia of arrest"—Maestas "was told multiple times he was not under arrest; he was not handcuffed; he was not restrained; his family had access to him"; and (4) "[t]he interrogation was brief and [Maestas] was never told about the Officer's belief that he was the driver or that anybody else was injured." R.201. Contrary to Maestas's claim on appeal, *see* Aplt. Brf. at 37-41, the trial court correctly concluded that he was not in custody and thus not entitled to *Miranda* warnings.

A defendant is entitled to *Miranda* warnings before being subjected to custodial interrogation by police. *See State v. Ferry*, 2007 UT App 128, ¶ 12, 163 P.3d 647 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). Statements obtained in violation of this requirement are inadmissible at trial. *Id.* Thus, the threshhold inquiry in any *Miranda*

challenge is whether the defendant was subjected to a custodial interrogation. "[C]ustodial interrogation occurs where there is both (1) custody or other significant deprivation of a suspect's freedom and (2) interrogation." *State v. Levin*, 2006 UT 50, ¶ 34, 144 P.3d 1096. Here, the State conceded below that Officer Horner's interview with Maestas at the hospital constituted an interrogation. R. 214:88. Thus, the only issue before this Court is whether the trial court properly ruled that Maestas was not in custody when he was interrogated.

"A person is in custody when '[his or her] freedom of action is curtailed to a degree associated with formal arrest.'" *Levin*, 2006 UT 50, ¶ 35 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)). This "inquiry is objective and considers 'how a reasonable man in the suspect's position would have understood his situation.'" *Id.* (quoting *Stansbury v. California*, 511 U.S. 318, 324 (1994)). "[A]n officer's views concerning the nature of an interrogation . . . may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views . . . were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." *Id.* Relevant factors that aid in the custody determination include: "'(1) the site of interrogation; (2) whether the [accused knew the] investigation focused on [him]; (3) whether the objective indicia of arrest were present; and (4) the length and form of the interrogation.'" *Id.* at ¶ 36 (quoting *State v. Mirquet*, 914 P.2d 1144, 1148 (Utah 1996)). "'[I]n deciding the custody issue, the totality of the circumstances is relevant, and no one factor is dispositive.'" *State v. Worthington*, 970 P.2d

714, 716 (Utah App. 1998) (quoting *Stansbury*, 511 U.S. at 321). A weighing of these factors in this case does not support a finding of custody.

Site of Interrogation. Maestas contends that "the location was custodial" because he "was confined to a hospital bed in the emergency room," because "he could not receive any friends or family as visitors," because "[m]edical personnel only entered the room to check on him intermittently," and because "Officer Horner conducted the interrogation in the middle of the night," which gave the hospital room "an isolated character." Aplt. Br. at 39 (citation omitted).

As the evidence reflects, however, the interview occurred "in a patient room in the emergency room," to which "[t]he door remained open and unlocked." R. 197-98. Moreover, "medical and hospital personnel were in and out of the room while the defendant was there." R. 197-98. The fact "that the interview was in view of and in the presence of medical personnel who continued to treat defendant during the brief interview" mitigates against a custody finding. *People v. Mosley*, 87 Cal.Rptr.2d 315, 330-32 (Ct. App. 1999) (discussing cases).

In addition, the evidence does not support Maestas's contention that he "was confined to a hospital bed in the emergency room" during the interview. Aplt. Br. at 39. To the contrary, the evidence shows that, although Maestas suffered a broken neck during the accident, he "had full movement in his arms and legs," and that he was not restrained to his hospital bed. R. 214:61. Also, nothing in the evidence suggests that Maestas requested the

presence of his family or friends before answering Officer Horner's questions or that the timing of the interview—shortly after the accident—gave the emergency room "an isolated character" any greater than an emergency room typically had. Aplt. Br. at 39. Finally, any confinement that Maestas may have experienced, such as being hooked up to an IV or not being permitted to receive visitors, "result[ed] from his injury and hospital admittance rather than by police restraint." *United States v. Jamison*, 509 F.3d 623, 625 (4th Cir. 2007). And "[a]bsent police-imposed restraint, there is no custody." *Id.* at 633.[7]

Thus, the fact that Maestas was interviewed in the emergency room does not suggest custody.

Investigation Focus. According to Maestas, the interrogation was also custodial because "the investigation was focused on Maestas," since "Maestas was suspected of being the driver in a serious DUI-related accident." Aplt. Br. at 39. However, although Officer Horner was aware that Maestas was suspected of being the driver of the Cadillac, Horner never indicated that suspicion to Maestas. R. 199. Because Officer Horner's "views concerning the nature of an interrogation" were never "manifested to [Maestas]," the fact

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[7] Maestas claims the trial court's finding "that Maestas 'may have had an IV'" is erroneous because "State's Exhibit 2 shows that Maestas had an IV and a catheter." Aplt. Br. at 16. Thus, according to Maestas, the trial court also erred in finding that "Maestas 'was not in custody' while in the emergency room because he 'was not restrained.'" *Id.* Even if the trial court erred in not expressly finding that Maestas had an IV and a catheter, however, Maestas makes no showing that those errors detract from the trial court's finding that Maestas was not in custody. Moreover, the trial court's finding—that Maestas "may have had an IV"—is sufficient to reflect that the court considered the possibility that Maestas had an IV when it made its custody ruling.

that Maestas may have been the focus of Horner's investigation also does not weigh in favor of a custody determination. *Mirquet*, 94 P.2d at 1148 ("officer's unarticulated subjective focus on a particular suspect is not relevant to the determination of whether the suspect is in custody for *Miranda* purposes").

Indicia of Arrest. The lack of indicia of arrest further mitigates against a finding of custody. First, only one officer—Officer Horner—was present during the interview. R. 188:109; R. 214:53-54.[1] Second, although Officer Horner was dressed in his standard uniform, he repeatedly told Maestas that he was not under arrest and that Maestas was free not to answer the officer's questions. R. 198, 199; R. 188:93-94. Third, Officer Horner never closed the emergency room door or otherwise isolated Maestas from other individuals. R. 197. And fourth, Officer Horner never threatened or restrained Maestas during the interview, nor did he ever draw his gun or handcuffs during the interview. R. 214:64, 69. In sum, "no indicia of arrest such as readied handcuffs, locked doors or drawn handguns were present." *Salt Lake City v. Carner*, 664 P.2d 1168, 1171 (Utah 1983).

Length and Form of Interrogation. Finally, the length and form of the detention mitigate against a finding of custody. The interrogation only "lasted approximately 15 minutes." R. 198. Moreover, Officer Horner began the interview by telling Maestas that he

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[1]Although Officer Grecko arrived to draw Maestas's blood later that morning, the blood draw occurred *after* Officer Horner's interview with Maestas. R. 188:98-99, 121; R. 214:58, 66. Moreover, "Officer Grec[k]o did not ask any questions of the defendant that did not relate to the taking of the blood and his stay was brief." R. 199.

"could choose whether to speak with [the officer] or not" and "never told the defendant about his belief that the defendant was the driver." R. 198-99. Finally, Officer Horner "asked [Maestas] very minimal questions," and those questions were "investigatory, not accusatory." R. 201; R. 214:60, 65.

These factors, when considered as a whole, therefore, do not support a finding that Maestas's "freedom of action [was] curtailed to a degree associated with formal arrest." *Levin*, 2006 UT 50, ¶ 35 (quotations and citations omitted). As such, the trial court correctly ruled that Maestas was not in custody when Officer Horner interviewed him.

C. Even if the trial court's rulings were erroneous, Maestas was not prejudiced thereby.

Even if this Court were to find error in either the trial court's voluntariness or custodial rulings, Maestas was not prejudiced by the admission of his statements to Officer Horner. As the Supreme Court held in *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991), "harmless-error analysis applies to coerced confessions." Here, any error in admitting

Maestas's statements to Officer Horner "'was harmless beyond a reasonable doubt.'" *Id.* (quoting *Chapman v. California,* 386 U.S. 18, 24 (1967)).[8]

Contrary to Maestas's contention, the evidence of Maestas's guilt did not consist solely of "Maestas's involuntary statements and Detective Mower's [accident reconstruction] testimony." Aplt. Br. at 30. Indeed, before Maestas even spoke to Officer Horner, Maestas had already admitted to the paramedic who treated him at the scene of the crash that he was driving the Cadillac when it crashed. R. 216:465, 488. And the paramedic testified at trial that, when Maestas made that statement, he was alert and oriented, and had a Glascow score of 15, indicating no confusion. R. 216:464, 468, 471, 481. Thus, Maestas's later admission of the same to Horner was merely cumulative of evidence the jury had already heard.

Moreover, Maestas's admission to the paramedic was corroborated by Maestas himself when, during his cousin's visit at the hospital, he responded to news that George had died, with, "Fuck, that's homicide." R. 216:515.

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[8] Maestas claims that, despite the United States Supreme Court's adoption of a harmless error standard to the admission of coerced confessions, this Court should adopt an automatic reversal rule under the Utah Constitution. *See* Aplt. Br. at 27-30. Maestas's suppression motion at trial, however, did not include an argument under the state constitution. R. 67-71. Moreover, Maestas does not claim on appeal that the trial court committed plain error under the Utah Constitution in admitting his statements. *See* Aplt. Br. at 17-27; *see also State v. Pinder,* 2005 UT 15, ¶ 45, 114 P.3d 551 (when party raises issue for first time on appeal, party must "articulate an appropriate justification for appellate review"; specifically, the party must argue either " 'plain error' " or " 'exceptional circumstance.'") (citation omitted). Where Maestas only raised his claim under the federal constitution, the federal standards for prejudice apply.

Evidence at the crash scene also corroborated Maestas's admission to the paramedic. As Detectives Getz and Mower, the Cadillac sustained no externally caused damage during the crash, and no blood was found on the driver's side air bag. R. 217:643, 655. In contrast, the Cadillac sustained substantial damage to the passenger side, and the blood and flesh evidence on the passenger side of the car and the light pole were consistent with George's injuries. R. 217:639, 647-50, 655, 676.

Finally, Maestas's admission to the paramedic was corroborated by the testimony of Detective Mower, the accident reconstruction expert, who reconstructed the accident and concluded that Maestas was the driver of the Cadillac. R. 217:610, 613-72, 678-80, 732. It is true, as Maestas notes, that his counsel cross-examined Mower testimony at trial. *See* Aplt. Br. at 31. But, contrary to Maestas's contention, that cross-examination did not substantially undermine Mower's testimony. *See id.* Most importantly, Mower explained why he had not determined that the use of "kinetic energy calculations" or "conservation of energy" formulas was not necessary in his reconstruction. R. 217:707-10, 726, 731-32, 734. Mower's testimony was corroborated by the testimony of Detective Getz, also an expert in accident reconstruction. R. 216:333-34. And Maestas presented no evidence—expert or otherwise—challenging the experts' reasons. Moreover, although Mower did testify that he interpreted the blood evidence "based on [his] life experience," R. 216:728, there is no evidence in the record that he therefore just "guessed what the blood evidence meant," Aplt. Br. at 31. And, although Mower "did not measure the size of the [back driver's side]

window to determine whether Maestas would fit through," Aplt. Br. at 31, nothing in the record suggested that Maestas would not have.

In sum, contrary to Maestas's contention, Mower's testimony was not "the only other proof that Maestas was driving" other than his statement to Horner. Aplt. Br. at 31. To the contrary, the State presented substantial other evidence—most obviously, Maestas's admission to the paramedic that he was driving—proving that fact. And all that evidence, combined with Detective Mower's accident reconstruction testimony, render admission of Maestas's statements to Officer Horner harmless beyond a reasonable doubt.

For this reason, also, Maestas's challenge to the trial court's suppression ruling fails.

II.

MAESTAS'S CLAIM THAT HIS COUNSEL WAS INEFFECTIVE IN NOT FORCING CO-DEFENDANT BLOOMFIELD TO TAKE THE STAND TO INVOKE HIS FIFTH AMENDMENT RIGHT TO SILENCE FAILS WHERE THE TRIAL COURT PROPERLY RULED THAT BLOOMFIELD'S PRIOR STATEMENT WAS INADMISSIBLE AS UNRELIABLE

Maestas claims that his trial counsel rendered ineffective assistance when, in seeking the admission of his co-defendant Bloomfield's statement exculpating Maestas, she failed to force Bloomfield to take the stand to formally invoke his Fifth Amendment right against self-incrimination. *See* Aplt. Br. at 42. According to Maestas, if his counsel had forced Bloomfield to take the stand and invoke his right "either inside or outside the presence of the jury," Bloomfield's statement would have been admissible, both as a prior inconsistent

statement under rule 801(d)(1)(A), Utah Rules of Evidence, or as a statement against interest under Rule 804, Utah Rules of Evidence. *Id.* at 42-43.

As stated, to succeed on an ineffective assistance of counsel claim, Maestas must show both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment," and that "counsel's deficient performance was prejudicial—i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Maestas cannot make that showing as to either of his claims.

A. Proceedings below.

On the first day of trial, Maestas's trial counsel informed the court that she had just learned that morning that Bloomfield, the co-defendant at Maestas's trial, might have evidence useful to Maestas. R. 215:1. Based on that information, Maestas's counsel then moved to sever the trials so that Maestas could call Bloomfield as a witness at the trial. R. 215:1-2. The trial court denied the motion, first, because it was untimely, and second, because, given the likelihood that Bloomfield would invoke his right not to testify even at a severed trial, severance would not render Bloomfield any more available than at the present trial. R. 215:9. The trial court left open, however, arguments concerning the admissibility of the statement under the hearsay rules of evidence applicable to unavailable declarants. R. 215:9.

On the second day of trial, Maestas's trial counsel confirmed that Maestas's former counsel, Manny Garcia, would testify that, in passing Bloomfield in court one day, Bloomfield told him that George had been driving. R. 216:245. Trial counsel then asserted that Bloomfield's statement was admissible under rule 804, Utah Rules of Evidence, as a statement against interest. R. 217:825-26. Before discussing the issue, the trial court confirmed with all counsel that they would accept the representations of Bloomfield's trial counsel that, if called to the stand, Bloomfield would assert his right not to testify. R. 217:826. All counsel agreed that the representation from Bloomfield's counsel would be sufficient to render Bloomfield unavailable. R. 817:827.

After argument, the trial court initially ruled that, although Bloomfield was unavailable, his statement was not admissible under rule 804 , first, because it was not sufficiently contrary to his self interest, and, second, because of concerns over its trustworthiness. R. 217:829-30.

The next day, the trial court revisited the issue. The court first confirmed that, despite Utah case law requiring the formal invocation of the privilege against self-incrimination, the parties would not require Bloomfield to do so here. R. 218:833-34. The court then indicated that it was leaning toward admitting the statement under rule 804, but would make its final ruling upon hearing Garcia's testimony outside the jury's presence. R. 217:835, 840-43.

Garcia testified that he knew Maestas because he had been appointed to represent him on a burglary charge in 2007, and was also initially appointed to represent him in this case.

R. 218:848. Garcia knew Bloomfield because Garcia represents parole violators in front of the Board of Pardons, and Garcia had just continued a parole revocation hearing involving Bloomfield. R. 218:848, 851. In addition, Garcia had discussed with Maestas the alleged involvement of Bloomfield in this case. R. 218:849-51. Garcia was "pretty sure" that Bloomfield also knew that Garcia was Maestas's attorney. R. 218:851.

Garcia testified that he never discussed this case with Bloomfield, "but I did ask him a question about it." R. 218:849. According to Garcia, he briefly met Bloomfield in the holding area at court and asked him one question: "Who was driving the other car?" R. 218:49-50. Bloomfield responded with one word: "George." R. 218:853. Garcia told Bloomfield, "Well, I'm going to have to talk to you, man," but the two never talked again. R. 218:849.

Garcia was not certain when the conversation took place. R. 218:852. He thought it might have been in April 2008, but he was pretty sure it was a day on which Garcia was there for a proceeding concerning Maestas. R. 218:851. Garcia also was "not sure" whether, after he withdrew as Maestas's attorney, he told Maestas's successor attorney, "but I think I told her that." R. 218:854. When asked if he remembered when he had told her, Garcia said, "No, again it would've been after I was taken off the case." *Id.*

In light of Garcia's testimony, the State asked the court to revisit whether the statement was a statement against interest under rule 804. R. 218:861. The State noted that, according to Garcia's testimony, at the time Bloomfield made the statement, he was

"represented by Mr. Garcia on a parole revocation hearing, and is represented by defense counsel, in this case, . . . so he's represented by two defense attorneys. He's been to prison, he knows how this works, you can tell your lawyer whatever you want, they can't tell anybody else. . . . And saying something when you [know] it cannot ever be used against you, cannot be a statement against your interest." R. 218:861-62. At a minimum, "Bloomfield has to waive the [attorney-client] privilege." R. 218:860.

In addition, the State argued, Garcia's question was not specific. He "didn't ask him who was driving—was it the Cadillac? Was it on this date? . . . [W]ho was driving the other car. . . . I don't see how a one word response to that question subjects yourself to such pecuniary sanctions or criminal sanctions that it's inherently reliable." R. 218:860-61. Moreover, "[w]ith regards to the other part of the reliability is that Mr. Garcia can't remember when it was, he can't remember how long ago it was, he can't even remember if Maestas was there, I just think there's no guarantees of trustworthiness to that—to that statement." R. 218:862.

After additional argument from defense counsel, the court agreed "with what the State has indicated here." R. 218:866. The court also noted that there are "some questions sufficient enough to cause me to pause whether or not those—that information should be admitted based on the fact . . . Bloomfield was represented at the time that the statement was made to Mr. Garcia." Thus, the court ruled that "the statement, although Mr. Bloomsfield—

or Bloomfield is unavailable, does not satisfy the second prong of 804, and that is that the statement must be a statement against interest." R. 218:867.

B. Maestas's rule 801(d)(1)(A) claim.

Rule 801(d)(1)(A) provides that "[a] statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is [] inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten."

In asserting his ineffectiveness claim based thereon, Maestas's complete argument consists of the following three sentences:

> Rule 801(d)(1)(A) says "a prior statement by a witness is admissible if it is inconsistent with the witness testimony at trial." *State v. Whittle*, 1999 UT 96, ¶ 21 n.4, 989 P.2d 52. Under rule 801, inconsistency "'" is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position."'" *Id.* (citations omitted). Thus, if Bloomfield had taken the stand and refused to testify, "his prior statements would have been admissible essentially to impeach his silence." *Id.*

Aplt. Br. at 42-43.

Such an argument is insufficient to establish either prong of Maestas's ineffectiveness claim. First, by its terms, rule 801(d)(1)(A) requires that the declarant testify at the trial, i.e., in the presence of the jury, and be subject to cross-examination. And *Whittle* recognizes that requirement. *See Whittle*, 1999 UT 96, ¶ 21 n.4 ("Accordingly, if [the witness] had retaken the stand and persisted in his refusal to testify despite the court's order to do so, his statements would have been admissible" under rule 801.).

But Bloomflied was a defendant in the very same criminal trial in which Maestas sought admission of his prior statement, and "[i]t is not to be doubted that the right of a defendant not to testify in a criminal trial is a fundamental right protected by both the federal and the Utah Constitutions." *State v. Kazda*, 540 P.2d 949 (Utah 1975). And Maestas's three-sentence ineffectiveness argument cites no legal authority holding that his counsel could have forced Bloomfield to take the witness stand despite his constitutional right not to. *See* Aplt. Br. at 42. Absent such authority, Maestas cannot show that his counsel performed deficiently in failing to do so. *See, e.g.*, Utah R. App. P. 24(a)(9) (defendant's brief "shall contain . . . citations to the authorities, statutes, and parts of the record relied on"); *State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72 ("reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research"); *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) ("[i]mplicitly," rule 24(a)(9) "requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority").

Moreover, even if defense counsel could have forced Bloomfield to take the witness stand and invoke his Fifth Amendment right against self-incrimination before the jury, Maestas cannot show that he was prejudiced by his counsel's failure to do so. *Whittle* implies that, when a witness refuses to testify, his prior statements "would have been admissible [only] to impeach his silence," not as substantive evidence. *Whittle*, 1999 UT 96, ¶ 21 n.4. Such a conclusion is consistent with the rule's requirement that the declarant be

"subject to cross-examination concerning the statement" before it can be admitted substantively as "not hearsay." Rule 801(d)(1)(A). And it is consistent with the federal case law on which *Whittle* relies in footnote 4, which holds that prior statements not meeting the requirements of rule 801(d)(1)(A) are "admissible only for impeachment purposes." *United States v. Russell*, 712 F.2d 1256, 1258 (9th Cir. 1983); *see also United States v. DiSantis*, 565 F.3d 354, 360 (7th Cir. 2009) (holding that prior inconsistent statements of witnesses "are admissible as non-hearsay, substantive evidence only if 'subject to cross-examination' and 'given under oath.'").

But "a prior statement offered for impeachment purposes is admissible only to show that the speaker is not worthy of belief; it is not received for the truth of the matter asserted." *Regan-Touhy v. Walgreen Company*, 526 F.3d 641, 651 (10th Cir. 2008). And if Bloomfield's statement would not have been admissible as substantive evidence under rule 801(d)(1)(A), the jury could not have considered it in deciding Maestas's guilt. Maestas, therefore, cannot show that counsel's alleged deficient performance "affected the outcome of the case." *Litherland*, 2000 UT 76, ¶ 19.

Under both prongs of the ineffectiveness test, therefore, Maestas's rule 801 claim fails.

C. Maestas's rule 804(b)(3) claim.

Rule 804(b)(3), of the Utah Rules of Evidence, allows the admission of a statement "if the declarant is unavailable as a witness" and the statement is one "which was at the time of

its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability . . .that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." However, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.*

Maestas claims that "[t]he failure to request that Bloomfield personally invoke the Fifth Amendment constituted deficient performance that prejudiced Maestas." Aplt. Br. at 46. According to Maestas, "[i]f Bloomfield had taken the stand and become unavailable under rule 804(a)(1), then his prior statement would have been admissible under rule 804(b)(3). *Id.* at 43-44.

In support of his contention that counsel needed to force Bloomfield to take the stand before he could meet the rule 801(a)(1) unavailability requirement, Maestas relies on *State v. White*, 671 P.2d 191, 193 (Utah 1983). *See* Aplt. Br. at 41-42. According to Maestas, under that case, "'to be honored by the court,'" invocation of one's right against self-incrimination "'must be made by the witness'"; it cannot be made by the witness's attorney. *Id.* at 42 (quoting *White*, 671 P.2d at 192-93).

In *White*, however, the State objected to the admission of the absent witness's statements, "because [the witness] had not been shown to be unavailable to testify in court." *White*, 671 P.2d at 192. Here, all parties stipulated to Bloomfield's unavailability. R.

817:827; R. 218:833-34. And the trial court accepted that stipulation, expressly recognizing that Maestas had met rule 804(a)(1)'s unavailability requirement as to Bloomfield's statement. R. 218:867.

The record, therefore, defeats Maestas's claim on its face. Given the parties' stipulation that Bloomfield was unavailable, Maestas cannot demonstrate that his counsel performed deficiently in not requiring Bloomfield to take the stand to formally invoke his right against self-incrimination. *Litherland*, 2000 UT 76, ¶ 19. And, given the trial court's acceptance of that stipulation in its ruling, Maestas cannot demonstrate that he was prejudiced by counsel's performance, even if it were deficient. *Id.*

Moreover, Maestas's prejudice claim rests on his contention that the trial court's ruling that Bloomfield's statement was not a statement against interest "was erroneous." Aplt. Br. at 44-46. Yet, Maestas nowhere addresses the full basis of the trial court's ruling—including that Bloomfield's statement was made to the attorney representing him at a parole revocation hearing, and, therefore, was made knowing that the attorney-client privilege would protect him from any recourse. *See id.* Nor does Maestas address the trial court's concerns—as recognized by its adoption of the State's reasoning—regarding the ambiguity of Bloomfield's one word response to Garcia's similarly ambiguous question. *See id.* Nor does Maestas address the court's concern—again as recognized by its adoption of the State's reasoning—concerning Garcia's inability to exactly identify the circumstances under which

he met Bloomfield or the time the meeting occurred. *See id.* Consequently, he has not shown that the trial court's ruling was in fact erroneous.

In sum, Maestas's ineffectiveness claim lacks merit.

III.

MAESTAS'S CUMULATIVE ERROR CLAIM FAILS, WHERE HE HAS NOT SHOWN ANY ERROR AT HIS TRIAL.

Finally, Maestas claims that the cumulative effect of his claimed errors warrants reversal of his convictions. *See* Aplt. Br. at 50.

This Court will reverse a conviction under the cumulative error doctrine only if "the cumulative effect of the several errors undermines [its] confidence . . . that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). If the defendant fails to establish any errors that prejudiced his right to a fair trial, the doctrine of cumulative error does not apply. *See Parsons v. Barnes*, 871 P.2d 516, 530 (Utah 1994). In this case, Maestas has not shown any error at his trial. Thus, the cumulative error doctrine does not apply.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted December 22, 2010.

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CERTIFICATE OF SERVICE

I certify that on December 21, 2010, two copies of the foregoing brief were ☑ mailed ☐ hand-delivered to:

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A digital copy of the brief was also included: ☐ Yes ☑ No

Melissa Reyes

Addendum A

Amendment V. Grand jury indictment for capital crimes; double jeopardy; self-incrimination; due process of law; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Jury trial for crimes and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV. Citizenship; privileges and immunities; due process; equal protection; apportionment of representation; disqualification of officers; public debt; enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by party–opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(a)(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(a)(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(a)(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(a)(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(a)(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(b)(1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(b)(2) *Statement under belief of impending death.* In a civil or criminal action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, if the judge finds it was made in good faith.

(b)(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(b)(4) *Statement of personal or family history.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.